IN THE

Supreme Court Of The United States

_____ TERM, 1979

NO. 79-451

MARIE FRAKES ..... *Petitioner*

VS.

RAY HUNT, ET AL ..... *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

CLARENCE DANIEL STRIPLING
P.O. Box 388
Clinton, Arkansas 72031

AND

JAMES EUGENE BURNETT
P.O. Box 147
Clinton, Arkansas 72031

Attorneys for Petitioner

TREVATHAN PRINTING COMPANY, NEWPORT, ARKANSAS

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Petitioner, MARIE FRAKES, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arkansas entered in this proceeding June 25, 1979.

I. OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 266 Ark. 171, 583 SW2d 497 (1979) and attached as Appendix "A". The dissenting opinion of Mr. Justice Fogleman is reported at 266 Ark. 175, 583 SW2d 499 and is attached as Appendix "B".

II. JURISDICTION

The opinion of the Arkansas Supreme Court was filed June 25, 1979, and the judgment was entered that date. This Petition for Writ of Certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3).

III. QUESTION PRESENTED

Whether the doctrine enunciated in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), holding that illegitimates as a class may not be precluded from inheriting through their father, applies to a case in which the illegitimate's father died prior to the date *Trimble* was announced.

IV. STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Ark. Stat. Ann. §61-141(d) provides: An illegitimate child or his decendants may inherit real or personal property in the same manner as a legitimate child from such child's mother or her blood kindred; but such child may not inherit real or personal property from his father or from his father's blood kindred.

The first section of Amendment 14 to the Constitution of the United States of America provides: All persons born or nationalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

V. STATEMENT OF THE CASE

Linn Hunt died intestate on April 19, 1972. He had never married. At the time of his death, Linn Hunt was the owner of several hundred acres in Van Buren County, Arkansas.

On September 26, 1977, Petitioner filed a complaint in the Van Buren Chancery Court seeking to quiet title to the acreage owned by Linn Hunt at his death. Respondents are the nieces and nephews and children of deceased nieces and nephews of Linn Hunt. In the action filed in the Van Buren Chancery Court, they were defendants. Within the time permitted by law, Respondents answered Petitioner's complaint asserting among other things that Petitioner was precluded from inheriting as the child of Linn Hunt since she is illegitimate. Respondents invoked Ark. Stat. Ann. §61-141(d) which precludes an illegitimate from inheriting through his father. Petitioner replied to Respondent's answers admitting that she is an illegitimate, but asserting that Ark. Stat. Ann. §61-141(d) is unconstitutional since it denied her equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Trial was held before the Chancellor in September, 1978. On October 20, 1978, the Chancellor entered his opinion. The Chancellor found that Petitioner had proven that she is the illegitimate daughter of Linn Hunt. The Chancellor found further that Ark. Stat. Ann. §61-141(d) is unconstitutional, having been held so by the principal announced in *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977). The Chancellor nevertheless held that Petitioner was precluded from inheriting through her father because the facts in the case before him could

be distinguished from the facts in *Trimble*. The Chancellor expressly declined to rule on the issue whether *Trimble* should be given retroactive application to a death occurring approximately five years before it was decided by the United States Supreme Court. The Chancellor reasoned that his ruling would not be affected whether *Trimble* was applied retroactively.

Upon appeal by Petitioner and cross-appeal by Respondents, the Supreme Court of Arkansas held that Ark. Stat. Ann. §61-141(d) is unconstitutional, but that the doctrine of *Trimble* should not be applied retroactively. Two Justices dissented, reasoning that *Trimble* should be applied retroactively. The decision was based solely on the question of retroactive application of the doctrine enunciated in *Trimble*. No issue of state law was decided.

VI. REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES THE SIGNIFICANT AND RECURRING FEDERAL QUESTION WHETHER THE DOCTRINE ENUNCIATED BY THIS COURT IN *TRIMBLE V. GORDON* SHOULD BE APPLIED RETROACTIVELY

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), this Court held that the Illinois statute which is almost identical to Ark. Stat. Ann. §61-141(d) is unconstitutional. Both the Chancellor before whom this cause was tried and the Supreme Court of Arkansas recognize that under the principal enunciated in *Trimble*, Ark. Stat. Ann. §61-141(d) is unconstitutional. Because Linn Hunt died prior to the date *Trimble* was announced, the Courts below were left to decide whether the doctrine enunciated in *Trimble* had retroactive application.

Both the majority and dissenting opinions of the Justices of the Supreme Court of Arkansas show that the issue which they were determining was a federal question. The majority opinion begins with the sentence:

> "The pivitol issue in this case is whether we should give retroactive effect to *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977)."

After discussing the fact situations which gave rise to this litigation, the majority opinion recognizes that Ark. Stat. Ann. §61-141(d) is constitutionally invalid under *Trimble v. Gordon*. The opinion, nevertheless, holds that Petitioner is precluded from inheriting through her father since the doctrine of *Trimble v. Gordon* will not be applied to a death occurring prior to the date it was rendered by the United States Supreme Court.

The majority opinion reasons that had Linn Hunt contacted an attorney prior to his death, that attorney could have informed him that his illegitimate child would not take under the law of decent and distribution relying confidently upon *Labine v. Vincent, Adm'r*, 401 U.S. 532, 91 S.Ct. 1017, 28 L. Ed. 2d 288 (1971). The majority further reasoned that uncertainty of titles could result in an unwillingness to improve real property, that the pretermitted child statute could create problems and that the Kentucky and Tennessee Courts had refused to give retroactive application to the *Trimble* doctrine. The majority rules expressly on the question of retroactivity, as opposed to distinguishing the facts in the present case from those of *Trimble*. The opinion states:

> "Based upon the foregoing authorities and to prevent chaotic conditions arising from the lack of title to real

property, we affirm the trial court — not for the reasons stated by the trial court — but on the basis that *Trimble v. Gordon,* supra, should not be applied retroactively."

The dissenting opinion deals at great length with the question whether the holding of *Trimble v. Gordon* should be applied retroactively. Mr. Justice Fogleman reviewed extensively United States Supreme Court authority upon this question. Mr. Justice Fogleman states:

"As Appellants have suggested, there is a sound basis for rejecting an attack upon the title to property in the hands of a bona fide purchaser for value in reliance upon a title which is vested in the legitimate heirs of a deceased father. This is not the case here. The statute of limitations on recovery of real property has not run in this case. I find no basis in the evidence for applying the doctrine of laches or estoppel here. The evidence indicates that there has been no administration on Linn Hunt's estate, although he had been dead more than five years when this suit was filed. If there had been a determination of heirship, it would certainly have been made known.

In my opinion, we should assume that *Trimble* has retroactive effect, until the United States Supreme Court has held to the contrary . . ."

Petitioner respectfully submits that the foregoing statements demonstrate clearly that the Supreme Court of Arkansas has decided a federal question.

The question presently before the Court is of great significance. Of course, there were many deaths prior to the date of *Trimble* where no probate proceeding had been

commenced or the probate was not complete. In the case at bar, no effort had been made to probate the estate of Linn Hunt or to establish heirship. Furthermore, there was no evidence that the nieces and nephews and children of nieces and nephews of Linn Hunt divided the property among themselves, sold the property or listed it for sale, mortgaged the property, made improvements on the property, or did any other act in reliance upon their asserted position that they are the heirs at law of Linn Hunt. Petitioner was the first person to present the matter of intestate succession of the estate of Linn Hunt before the Courts of the State of Arkansas. In doing so, Petitioner alleged that the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States prohibited the State of Arkansas from refusing her the right to inherit from her father because she is illegitimate. Had the Respondents caused the estate of Linn Hunt to be administered before the Probate Court; or had they sold the property to a bona fide purchaser for sale; or had they taken any significant action in reliance upon their putative heirship, the Courts would be required to balance the rights of Respondents, or those asserting claims through them, against the rights of the Petitioner to equal protection of the law. However, Respondents neither alleged nor proved at trial any reliance upon the unconstitutional statute.

The question presently before this Court has already been presented to the appellate courts of several states. The New Jersey Superior Court considered the question in a case *In the Matter of the Estate of Sharp,* 151 N.J. Super. 579, 377 A.2d 730 (1977). The Court stated:

"Since decedent died before *Trimble v. Gordon* was decided, there is a retroactivity question. Certainly

a decision of unconstitutionality may in an appropriate case be prospective only. (Case Cited). And prospective application may be particularly fair in a property case where persons have justifiably relied on prior law. (Cases Cited). Thus, the Court does not suggest that estates of intestate male decedents who died before *Trimble v. Gordon* were wrongfully distributed when illegitimate children were not included. Nor does the Court suggest that if a testate male decedent died before *Trimble v. Gordon* and failed to mention or provide for an illegitimate child born after the execution of his will, that the will, if probated before *Trimble v. Gordon,* should have been treated as revoked in whole or in part. (Statute Cited). Such cases must be decided on the facts as they are presented. This Court simply holds that where the death was before *Trimble v. Gordon* but the will was not offered for probate until after that case was decided, and where the will is so ambiguous that no beneficiary could have reasonably relied on its terms as to the receipt of any gift, *Trimble v. Gordon* should be applied."

The Texas Court of Appeals has also been presented this issue. In *Lovejoy v. Lillie,* 569 SW2d 501 (Court of Appeals of Texas, 1978), decedent died in 1971. Probate was commenced in 1973 and application for determination of heirship was filed in 1974. The Texas Court took the position that the date of the decision in *Trimble* was unimportant, holding that the doctrine of *Trimble* should be applied.

The Supreme Court of Florida in the case *Estate of Burris,* 361 So.2d 152 (Fla. 1978), applied the doctrine of *Trimble* to a death which occurred in May, 1975.

In *Pendelton v. Pendelton,* 560 SW2d 538 (Ky. 1977), the Kentucky Supreme Court held that the doctrine of *Trimble* would be applied prospectively only. The Court stated expressly that its opinion would have no retroactive effect upon the devolution of any title occurring prior to the date of the *Trimble* opinion.

The Arkansas Supreme Court cited *Allen v. Harvey,* 568 SW2d 829 (Tenn. 1978), as authority for the position that the *Trimble* doctrine would not be applied retroactively. The Tennessee Court held in this case that the illegitimate could inherit although the illegitimate's father died in 1942 and the aunt of the illegitimate through whom the illegitimate claimed died in 1971 or before. The Supreme Court of Tennessee stated:

> "The application of this decision shall be prospective only, but it shall govern any cases pending in the Courts of Tennessee, on the date this opinion is released, asserting the right of children born out of wedlock to inherit from their natural father."

The Tennessee Court decided this case on June 29, 1978, over a year after *Trimble* was decided. The Court granted to those persons who relied upon *Trimble* the right to assert the doctrine of *Trimble* where a death occurred prior to the date of *Trimble* if that action was filed prior to the date of *Allen.* Petitioner would have been permitted to assert her claim under this holding.

Petitioner respectfully submits that the cases cited show that the question whether *Trimble* shall have retroactive application is a recurring question within the various states. Petitioner further submits that the cited cases show a lack of consistency among the states upon this issue and

it is greatly desirable that this Court rule expressly whether the doctrine of *Trimble* is to be applied to deaths occurring prior to the date *Trimble* was announced.

VII. CONCLUSION

The Writ of Certiorari should be granted and the Supreme Court of Arkansas directed to give retroactive application to the doctrine of this Court announced in *Trimble v. Gordon.*

Respectfully submitted,

CLARENCE DANIEL STRIPLING
P.O. Box 388
Clinton, Arkansas 72031

AND

JAMES EUGENE BURNETT
P.O. Box 147
Clinton, Arkansas 72031

Attorneys for Petitioner

Appendix

APPENDIX "A"

EN BANC

SUPREME COURT OF ARKANSAS

No. 79-33

MARIE FRAKES, *Appellant* v. RAY HUNT, ET AL, *Appellees*	Opinion Delivered June 25, 1979 Appeal From Van Buren Chancery Court CARL B. McSPADDEN, *Chancellor* *Affirmed*

CONLEY BYRD, *Associate Justice*

The pivotal issue in this case is whether we should give retroactive effect to *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977). The facts giving rise to this litigation show that Linn Hunt died intestate on April 19, 1972. He had never married but had numerous collateral heirs, appellees Ray Hunt, et al. The principal asset of his estate was more than 400 acres of land which appellees have had possession of since Linn Hunt's death. There is a statute, Ark. Stat. Ann. §61-141(d) (Repl. 1971), which prevents illegitimate children from inheriting from their fathers. Our statute is almost identical to the Illinois statute declared unconstitutional on equal protection grounds in *Trimble v. Gordon, supra,* on April 26, 1977. On September 26, 1977,

appellant Marie Frakes brought this action, contending that she was the illegitimate child of Linn Hunt and that in view of *Trimble v. Gordon, supra,* she inherited the 400 acres of land that Linn Hunt owned as his sole heir. The trial court held Ark. Stat. Ann. §61-141(d) (Repl. 1971) was unconstitutional in view of *Trimble v. Gordon, supra.* He also found that appellant was the illegitimate child of Linn Hunt. However, the trial court ruled that appellant was not within the class of illegitimates who would be permitted to inherit from her father, since there was no semblance of a parent-child relationship nor was there a formal order establishing paternity. Both parties have appealed.

We, as did the parties in oral argument, recognize that Ark. Stat. Ann. §61-141(d) (Repl. 1971) is constitutionally invalid under *Trimble v. Gordon, supra,* — see *Lucas v. Handcock, Adm'x.,* (handed down this same date). In her brief, appellant, with respect to the pivotal issue of whether she can rely upon *Trimble v. Gordon, supra,* states:

> "Appellant recognizes that if Ark. Stat. Ann. 61-141(d) is declared unconstitutional the Court will be required, in some cases, to enunciate rules that will protect those persons who have relied upon the statute. In some cases, equity and justice will require exception to permitting inheritance by illegitimates where heirs or bona fide purchasers for value have acted in reliance on a justified assumption that no illegitimate exists. Appellant contends that in her case no necessity exists for enunciating such a rule since no bona fide purchasers for value are involved in the litigation and since there has been no reliance upon the non-existence of an illegitimate by those nieces and nephews and

> children of nieces and nephews who would have inherited from Linn Hunt, but for Appellant."

Arkansas, like most states, permits a person to will his property to whomever he wishes to the exclusion of children. To exclude children, however, Ark. Stat. Ann. §60-507 (Repl. 1971), requires that a child be mentioned specifically or as a member of a class. If a person does not elect to make a will, then his property, upon his death, is distributed according to the laws of descent and distribution. Consequently, a person of modest means who is satisfied with the persons to whom distribution of his property would be made under the law of descent and distribution has no reason to go to the trouble and expense of making a will. Had Linn Hunt made an inquiry of his lawyer as to the law of descent and distribution as much as a year before his death, his lawyer with confidence, citing *Labine v. Vincent, Adm'r,* 401 U.S. 532, 91 S.Ct. 1017, 28 L. Ed. 2d 288 (March 29, 1971), could have informed Linn Hunt that an illegitimate child would not take under the law of descent and distribution.

Furthermore, should we accept appellant's argument, we would run head-on into a title problem that could materially hamper the improvement of property, for Ark. Stat. Ann. §37-226 (Repl. 1962) provides:

> "If any person entitled to bring any action, under any law of this state, be at the time of the accrual of the cause of action, under twenty-one [21] years of age, or insane or imprisoned beyond the limits of the state, such person shall be at liberty to bring such action within three [3] years next after full age, or such disability may be removed."

See, also, the pretermitted child statute, Ark. Stat. Ann. §60-507(b) (Repl. 1971).

When the Supreme Court of Kentucky was faced with the problem before us in *Pendelton v. Pendelton,* (Ky. 1978) 560 SW2d 538 it held:

> "Insofar as it declares the invalidity of KRS 391.090 this opinion shall have no retroactive effect upon the devolution of title occurring before April 26, 1977 (the date of the Trimble opinion), except for those specific instances in which the depositive constitutional issue raised in this case was then in the process of litigation."

The Supreme Court of Tennessee after holding its illegitimate statute invalid in *Allen v. Harvey,* Tenn. 568 SW2d 829 (1978) stated:

> "The decision we reach today — that a child born out of wedlock may inherit from and through his father — is specifically limited to cases where paternity is established by clear and convincing proof and to cases where rights of inheritance have not finally vested. All cases in conflict with this decision are hereby expressly overruled.
>
> The application of this decision shall be prospective only but it shall govern any cases pending in the courts of Tennessee on the date this opinion is released, asserting the right of children born out of wedlock to inherit from their natural father."

Based upon the foregoing authorities and to prevent chaotic conditions arising from the lack of title to real property, we affirm the trial court — not for the reasons

stated by the trial court — but on the basis that *Trimble v. Gordon, supra,* should not be applied retroactively.

By a cross appeal, appellees contend that the trial court erred in finding that appellant was the illegitimate child of Linn Hunt. While we have some doubt whether the evidence of paternity is sufficient to sustain the heavy burden of proof required to prove paternity, we need not address that issue as our decision on the retroactive effect of *Trimble v. Gordon, supra,* makes the finding of paternity moot.

Affirmed.

Fogleman and Purtle, JJ., dissent.

APPENDIX "B"

EN BANC

SUPREME COURT OF ARKANSAS

No. 79-33

MARIE FRAKES, *Appellant* v. RAY HUNT, ET AL, *Appellees*	Opinion Delivered June 25, 1979 Appeal From Van Buren Chancery Court CARL B. MCSPADDEN, *Chancellor* *Dissenting Opinion*

JOHN A. FOGLEMAN, *Justice*

With all due respect to my brethren of the majority and to the Supreme Courts of Tennessee and Kentucky, I cannot join in the holding that *Trimble v. Gordon,* 430 U.S. 762, 97 S.Ct. 1459, 52 L. Ed. 2d 31 (1977), shall not be applied retroactively. It is not within the power of this court to say whether the decisions of the United States Supreme Court are retroactive. That is a matter for that court and that court alone. See *Laabs v. Wisconsin Tax Commission,* 218 Wis. 414, 261 NW 404 (1935). There is no indication in the opinion in *Trimble* that it should be restricted to prospective effect. The fact that there was no such indication weighs heavily in favor of retroactivity. *Stocker v. Hutto,* 547 F.2d 437 (8 Cir., 1977); *Chavez v. Rodriguez,* 540 F.2d 500 (10 Cir., 1976).

In *Trimble,* the United States Supreme Court held that an adjudication in a paternity action was sufficient to establish the illegitimate child's right to claim a child's share without compromising the state's legitimate interest in the accurate and efficient disposition of property at the death of that child's blood father. The case was remanded for further proceedings not inconsistent with the opinion. This would seem to indicate that the decision was not to be given prospective effect only.

Until the decision in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L. Ed. 2d 601 (1965), both common law and decisions of the United States Supreme Court recognized a general rule of retrospective effect for the constitutional decisions of that court, subject to limited exceptions. The court declared that it was charting new ground in *Linkletter,* which was an exception to the general rule. In *Linkletter* and *Desist v. United States,* 394 U.S. 244, 89 S.Ct. 1030, 22 L. Ed. 2d 248 (1969), the criteria for determining whether such a decision was to be accorded retrospective or prospective effect were established. *Robinson v. Neil,* 409 U.S. 505, 93 S.Ct. 876, 35 L. Ed. 2d 29 (1973). But those criteria relate primarily to constitutional rules relating to criminal trials, and have little bearing on equal protection cases. It was pointed out in *Desist,* however, that extent of reliance on the continuing validity of previous decisions was to be applicable only when the purpose of the new constitutional rule did not clearly favor either retroactivity or prospectivity.

The court's decisions denying retroactivity, outside the criminal law field, related primarily to procedural rules. See *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411, 84 S.Ct. 461, 11 L. Ed. 2d 440 (1964).

We are here dealing with a decision holding unconstitutional a statutory provision not pertaining to criminal

law or to procedural rules. It has been said that such a statute must be treated as if it had never been passed. *Morgan v. Cook,* 211 Ark. 755, 202 SW2d 355; *State v. Williams-Echols Dry Goods Co.,* 176 Ark. 324, 3 SW2d 340; *Cochran v. Cobb,* 43 Ark. 180. We have said that no rights can be predicated on an unconstitutional statute. *Road Improvement Dist. No. 4 v. Burkett,* 163 Ark. 578, 260 SW 718. Perhaps the matter has been overstated in these cases, but none of them have been overruled, and, although I realize this court has given only prospective effect to decisions overruling previous decisions in some cases, I am unaware of any case in which we have said that a decision holding a statute unconstitutional had prospective effect only. To do so is to say, in effect, that the statute was valid today, or perhaps yesterday, but from now on it is invalid. This is certainly not logical.

Perhaps there is a more desirable means of dealing with the effect of a decision holding a statute unconstitutional. Dictum in *Chicot County Drainage District v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317, 84 L. Ed. 329 (1940), was the first indication that the United States Supreme Court would do so. There the court said:

> The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree. *Norton v. Shelby County,* 118 U.S. 425, 442, 30 L. Ed. 178, 186, 6 S.Ct. 1121; *Chicago I. & L. R. Co. v. Hackett,* 228 U.S. 559, 566, 57 L. Ed. 966, 969, 33 S.Ct. 581. It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must

> be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified. Without attempting to review the different classes of cases in which the consequences of a ruling against validity have been determined in relation to the particular circumstances of past transactions, we appropriately confine our consideration to the question of res judicata as it now comes before us.

Ever since *Linkletter* was decided, the United States Supreme Court has struggled with the problem of nonretroactivity, which might have been solved there by applying the result reached in *Chicot County Drainage District v. Baxter State Bank,* supra. A four-judge plurality addressed itself to the problem and invented a new approach in *Lemon v. Kurtzman,* 411 U.S. 192, 93 S.Ct. 1463, 36 L. Ed. 2d 151 (1973). They said:

Claims that a particular holding of the Court should be applied retroactively have been pressed on us frequently in recent years. Most often, we have been called upon to decide whether a decision defining new constitutional rights of a defendant in a criminal case should be applied to convictions of others that predated the new constitutional development. *E.g., Robinson v. Neil,* 409 U.S. 505, 35 L. Ed. 2d 29, 93 S.Ct. 876 (1973); *Adams v. Illinois,* 405 U.S. 278, 31 L. Ed. 2d 202, 92 S.Ct. 916 (1972); *Desist v. United States,* 394 U.S. 244, 22 L. Ed 2d 248, 89 S.Ct. 1030 (1969); *Stovall v. Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S.Ct. 1967 (1967); *Johnson v. New Jersey,* 384 U.S. 719, 16 L. Ed. 2d 882, 86 S.Ct. 1772 (1966); *Tehan v. Shott,* 382 U.S. 406, 15 L. Ed. 2d 453, 86 S.Ct. 459 (1966); *Linkletter v. Walker,* 381 U.S. 618, 14 L. Ed. 2d 601, 85 S.Ct. 1731 (1965). But "in the last few decades, we have recognized the doctrine of nonretroactivity outside the criminal area many times, in both constitutional and nonconstitutional cases." *Chevron Oil Co. v. Huson,* 404 U.S. 97, 106, 30 L. Ed. 2d 296, 92 S.Ct. 349 (1971); *Hanover Shoe v. United Shoe Machinery Corp.,* 392 U.S. 481, 20 L. Ed 2d 1231, 88 S.Ct. 2224 (1968); *Simpson v. Union Oil Co.,* 377 U.S. 13, 12 L. Ed. 2d 98, 84 S.Ct. 1051 (1964); *England v. State Board of Medical Examiners,* 375 U.S. 411, 11 L. Ed. 440, 84 S.Ct. 461 (1964). We have approved nonretroactive relief in civil litigation, relating, for example, to the validity of municipal financing founded upon electoral procedures later declared unconstitutional, *Cipriano v. City of Houma,* 395 U.S. 701, 23 L. Ed. 2d 647, 89 S.Ct. 1897 (1969), and *City of Phoenix v. Kolodziejski,* 399 U.S. 204, 26 L. Ed. 2d 523, 90 S.Ct. 1990 (1970); or to the validity of

elections for local officials held under possibly discriminatory voting laws, *Allen v. State Board of Elections,* 393 U.S. 544, 22 L. Ed. 2d 1, 89 S.Ct. 817 (1969). In each of these cases, the common request was that we should reach back to disturb or to attach legal consequence to patterns of conduct premised either on unlawful statutes or on a different understanding of the controlling judge-made law from the rule that ultimately prevailed.

Appellants urge, as they did in the District Court, a strange amalgam of flexibility and absolutism. Appellants assure us that they do not seek to require the schools to disgorge prior payments received under Act 109; in the same breath, appellants insist that the presently disputed payment be enjoined because an unconstitutional statute "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County,* 118 U.S. 425, 442, 30 L. Ed. 178, 6 S.Ct. 1121 (1886). Conceding that we have receded from *Norton* in a host of criminal decisions and in other recent constitutional decisions relating to municipal bonds, appellants nevertheless view those precedents as departures from the established norm of Norton. We disagree.

The process of reconciling the constitutional interests reflected in a new rule of law with reliance interests founded upon the old is "among the most difficult of those which have engaged the attention of courts, state and federal . . . ." *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 374, 84 L. Ed. 329, 60 S.Ct. 317 (1940). Consequently, our

holdings in recent years have emphasized that the effect of a given constitutional ruling on prior conduct "is subject to no set 'principle of absolute retroactive invalidity' but depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application.' " *Linkletter,* supra, at 627, 14 L. Ed. 2d 601, quoting from *Chicot County Drainage Dist.,* supra, at 374, 84 L. Ed. 329. However appealing the logic of *Norton* may have been in the abstract, its abandonment reflected our recognition that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct. This fact of legal life underpins our modern decisions recognizing a doctrine of non-retroactivity. Appellants offer no persuasive reason for confining the modern approach to those constitutional cases involving criminal procedure or municipal bonds, and we ourselves perceive none.

In *Linkletter,* the Court suggested a test, often repeated since, embodying the recent balancing approach; we looked to "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.,* at 629, 14 L. Ed. 2d 601. Those guidelines are helpful, see infra, at 201-203, 36 L. Ed. 2d at 162, 163, but the problem of *Linkletter* and its progeny is not precisely the same as that now before us. Here, we are not considering whether we will apply a new constitutional rule of criminal law in reviewing judgments of conviction obtained under a prior standard; the problem of

the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional. True, the temporal scope of the injunction has brought the parties back to this Court, and their dispute calls into play values not unlike those underlying *Linkletter* and its progeny. But however we state the issue, the fact remains that we are asked to re-examine the District Court's evaluation of the proper means of implementing an equitable decree. Cf. *United States v. Estate of Donnelly,* 397 U.S. 286, 295, 25 L. Ed. 2d 312, 90 S.Ct. 1033 (1970); *id.,* at 296-297, 25 L. Ed. 2d 312 (Harlan, J., concurring).

In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15, 27 n 10, 28 L. Ed. 2d 554, 91 S.Ct. 1267 (1971). Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. * * * *

The plurality then disposed of the effect of the statute in the proceeding before it by treating it as an equity proceeding. That position did not draw a majority. One justice concurred only in the judgment. One justice did not participate. Three took the position that the problem of retroactivity involved in criminal cases was inapplicable and that a losing litigant has no equity in the fact that he relied on advice that turned out to be unreliable or wrong. They felt that only a compelling circumstance should limit a judicial ruling to prospective applications.

As appellants have suggested, there is a sound basis for rejecting an attack upon the title to property in the hands of a bona fide purchaser for value in reliance upon a title which had vested in the legitimate heirs of a deceased father. That is not the case here. The statute of limitations on recovery of real property had not run in this case. I find no basis in the evidence for applying the doctrines of laches or estoppel here. The evidence indicates that there has been no administration on Linn Hunt's estate, although he had been dead more than five years when the suit was filed. If there had been a determination of heirship, it would certainly have been made known.

In my opinion, we should assume that *Trimble* has retroactive effect, until the United States Supreme Court has held to the contrary. I would remand this case, however, to the trial court for a reconsideration of the question of paternity. The trial judge found that appellant had shown by a preponderance of the evidence that she was the illegitimate child of Linn Hunt. We have said that this relationship must be shown by clear and convincing evidence. There are reasons to question whether appellant met that test. It is significant to me that the bastardy action was not pursued to judgment, that appellant never had but one conversation with her mother about her paternity (and that was when she was 12 years old), and that when appellant applied for a birth certificate two years before *Trimble* was decided, she did not give Linn Hunt's name as her father. So much depends upon credibility of witnesses and weight given their testimony, in deciding whether evidence is clear and convincing, only the judge who saw and heard them testify should make that decision.

I am authorized to state that Mr. Justice Purtle joins in this opinion.